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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

NUMBER 920

LAWRENCE E. FOGARTY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

## PETITION FOR A WRIT OF CERTIORARI
## To the United States Court of Appeals for the Fifth Judicial Circuit

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## PETITION FOR A WRIT OF CERTIORARI
## To the United States Court of Appeals for the Fifth Judicial Circuit

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Petitioner Lawrence E. Fogarty prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on February 12, 1959, and its denial of Petitioner's motion for re-hearing on April 3, 1959.

## CITATIONS OF OPINIONS BELOW

The opinion of the Court of Appeals printed in Appendix B hereto, page 12, as yet unreported, affirms the convictions and judgments on all counts of the indictment.

## JURISDICTION

Judgment of the Court of Appeals was entered on February 12, 1959, page 12, infra. Timely petition for re-hearing was filed on March 12, 1959, and was denied on April 3, 1959. Jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1254 (1).

## QUESTIONS PRESENTED

In a prosecution for alleged violation of Title 18, U.S.C.A., Sections 656 and 1005, the Banking statutes charging misapplication of bank funds, and conspiracy to so misapply, the following questions are presented as a basis for the petition to this Court.

### I

Whether the Trial Court's charge on defendant's failure to testify was plain error when the Trial Court predicated the right of the defendant not to testify upon the Fifth Amendment, instead of upon the statutory option embodied in Title 18, U.S.C.A. 3481.

(a) Whether the charge of the Trial Court as given was, in fact, an actual shift of the burden of proof from the prosecution to the defense, so that such error was not curable by additional instruction to the jury.

(b) Whether the District Court's incorrect use of the Fifth Amendment as the basis for defendant's failure to testify was such prejudicial error, which any additional instruction would only aggravate rather than cure.

(c) Whether the present public misconception of the purpose and use of the Fifth Amendment of the Constitu-

tion is such that this incorrect and unnecessary reference and use thereof by the Trial Court, resulted in placing defendant in a prejudicial and unfavorable position before this trial jury so that any question of defendants having a fair and impartial jury consideration was unlikely.

II

Whether the Trial Court's extensive favorable comments concerning the hostile co-defendant were of such a prejudicial nature that the defendant's motion for a mistrial at the conclusion of the charge was proper and should have been granted.

III

Whether the Trial Court's comments to the jury were of such a nature that they exceeded the permissive discretionary bounds allowed under the Federal Rules of Criminal Procedure.

IV

Whether the error alleged in Questions I, II and III, supra, is such error, which would bring them under the provisions of Rule 52 (b), Federal Rules of Criminal Procedure.

V

Whether the cumulative effect of the comments of the Trial Court concerning the Court's impression of the evidence, and the credibility of the testimony of the hostile co-defendant, coupled with the remarks of Government counsel, constitute such prejudice that defendant's right to a fair and impartial jury consideration, was seriously impaired.

## STATUTES INVOLVED

Title 18, U.S.C.A., Section 656, and Title 18, U.S.C.A., Section 1005; Title 18, U.S.C.A. 3481, and the Fifth Amendment of the United States Constitution.

Title 18, U.S.C.A. 3481, cited as Appendix A, page 11. The Fifth Amendment cited as Appendix A, infra, page 11.

## STATEMENT

Petitioner was convicted in the United States District Court for the Southern Judicial District of Texas on an indictment charging violation of Title 18, U.S.C.A., Section 658, and Section 1005, and conspiracy under Title 18, U.S.C.A., Section 371.

The charges embodied in the indictment were concerning misapplication of bank funds, and false entries in official bank records; and a conspiracy to misapply and make such false entries.

The case was tried before a jury and both defendants, including Petitioner, were convicted on all counts.

The Petitioner's counsel and Government counsel were informed by the Trial Court during the trial that the Court intended to give the usual charges on the various aspects of the offenses, and this specifically included a charge on failure to testify. Since the usual charges on failure to testify in the Southern District have uniformly been of an extremely cautious and restricted nature, neither Petitioner nor the Government counsel submitted a written request thereon.

This conversation does not appear in the transcript submitted to the Circuit Court since Petitioner's financial

circumstances allowed only a limited purchase of a small part of the entire transcript, and necessitated his joining the Government in the "statement of facts" submitted in lieu of the entire record. (R. 270)

On the trial of the case on the merits, co-defendant Heaslet adopted a hostile defense, and his entire case was predicated on placing all blame for any wrong doing on the Petitioner.

Co-defendant took the stand and testified that he was innocent and that all of the alleged wrong doing, if any, was the fault of the Petitioner. (R. 140-162)

After opening argument for the Government, Petitioner moved for a mistrial on the basis of remarks made by Government counsel, which Petitioner felt were of such a prejudicial nature that they could not be cured. (R. 188, 189, 191). The Trial Court denied this motion. (R. 210)

At the conclusion of the argument by the Government, Petitioner again moved for a mistrial on the basis of inflammatory and prejudicial comments by the Government counsel. (R. 210). Said motion was overruled by the Trial Court.

The Trial Court charged the jury and spent considerable time explaining to the jury the reasonableness of the co-defendant's testimony and failing to mention one of the important pieces of testimony by co-defendant Heaslet, where he admitted Petitioner was given permission to withdraw funds from his, Heaslet's bank account, which permission was of fundamental importance to the defense of Petitioner.

Near the conclusion of the charge, the Trial Court instructed the jury on the failure of the Petitioner to take the witness stand to testify in his own behalf as follows:

> "I instruct you further that Mr. Fogarty, one of the defendants here, has not seen fit to take the witness stand and to testify in his own behalf. I instruct you that under the Fifth Amendment of the Constitution of this country, he is within his rights in adopting that view. The fact that he did not testify is not evidence of his guilt; it does not create any inference or presumption of his guilt, and you will not let the fact that he saw fit not to testify weigh in the slightest degree against him in your deliberations, nor will it be a subject of discussion or comment during your deliberations."

Petitioner did not interpose an objection at that time, but immediately upon the conclusion of the charge, moved for a mistrial because of the basically prejudicial effect of the entire charge, including the comments on Heaslet, the omission of the material evidence on Fogarty, (R. 236), and the incorrect and prejudicial use of the Fifth Amendment. (R. 237)

Motion for mistrial was denied. The jury returned a verdict of guilty. (R. 238)

After sentence, the Petitioner moved for a new trial and said motion was denied.

After perfecting his appeal, Petitioner requested the Appellate Court of the Fifth Circuit to reverse the conviction, on the basis of numerous errors set forth in the record. The Circuit Court of Appeals, Fifth Circuit, denied Petitioner's request for relief and Petitioner then

brings this, his last appeal, to the Supreme Court of the United States.

## REASONS FOR GRANTING THE WRIT

1a. The unfortunate, but present growing public misunderstanding of the use of the Fifth Amendment of the Constitution makes any reference to said amendment one which must be carefully considered.

The Court's charge in this case presents a clear and simple error of law, as well as the question of the recognition of the fact that there is a general public hostility to the use of the Self-Incrimination prohibition of the Fifth Amendment, unless it is carefully explained. 40 AM. Bar. Assoc. J. 404.

The Court, instead of giving the usual charge on failure to testify, added that the Petitioner's decision was predicated on his rights under the Fifth Amendment. This was error, Petitioner had no such right, and the jury should have been clearly instructed that the option to testify was one created by statute, by an act of Congress in Title 18, U.S.C.A. 3481.

The misuse of the Fifth Amendment injected into an already prejudicial atmosphere, an inference that could not be cured by any amount of additional instruction. To further attempt to explain away the error, to direct the jury's attention once again to this fact would, in reality place such inference before the lay jury, which could only further deteriorate the Petitioner's position before this jury.

It is clear that the charge as given, was phrased in such terms that the very act of exercising the *Cautionary Charge* resulted in circumventing its basic purpose, and in

effect, amounted to a comment and inference, which contravened the spirit and wording of the Fifth Amendment.

The Court's use of the phrase "saw fit not to testify," raised a presumption to the jury that this defendant was in fact, "hiding behind the Fifth Amendment," which the Court erroneously used as the predicate for the charge.

The Court should clearly define the difference between the fundamental constitutional right against self-incrimination and the statutory option embodied in Title 18, U.S.C.A., Section 3481, since the right to testify is not a right derived from the fundamental document, i.e., the Constitution, but is a product of the legislature, which changed the old common law view, (8 Wigmore on Evidence §2551) and created the current right to testify in one's own behalf, if the defendant so desired.

b. The charge of the Court on the failure to testify clearly raises the issue of a shifting of the historic burden from the prosecution to the defense. This trend must be stopped, the limits clearly defined, and defendants such as Petitioner, protected from this drift into an actual invasion of their constitutional right to have the prosecution prove its use; and not, as is happening, force a defendant "to tell his side of the story", as is rapidly becoming the view of the lay public, due to the legal confusion surrounding this issue.

Jurors have come to expect a defendant "to tell his side of the story". *U. S. v. Grunewald*, 233 F. 2d 566, and 104 A.L.R. 479.

2 and 3. The Trial Court's comments must be considered in their entirety to appreciate the impact they have on Petitioner's position before the jury. In view of

the hostility of the co-defendant, the burden on the Trial Court to refrain from unnecessary or excessive comment is greater. The Circuit Court recognized, in part, that the action of the Trial Court was questionable, and agrees that the desirable practice in this case is to refrain from inferring that he credits one or discredits the other of hostile co-defendants.

The Court must remain impartial and disinterested *Blumberg v. U. S.*, 1955, 222 F. 2d 496; *Gomila v. U. S.*, 1944, 146 F. 2d 372; *Quercia v. U. S.*, 289 U.S. 466.

Petitioner submits the Trial Court's comments exceeded the permissive discretionary bounds allowed under the Federal Rules of Criminal Procedure.

4. The Petitioner submits that the errors complained of were in fact such error as covered by Rule 52(b) of the Federal Rules of Criminal Procedure, and that such error was not capable of cure by additional comment to a lay jury with a limited understanding of the issue of prejudice and constitutional protections.

## CONCLUSION

Because of the importance of the questions raised in the administration of Federal Criminal Law, with reference to the protection of the constitutional rights of a defendant in a Federal Criminal trial, including the urgent need for a clear definition of the extent that a trial court may go in giving the cautionary charge before it contravenes the spirit and intent of the constitutional guarantees of a fair impartial trial and a clear and authoritative filing of the limits of discretion a trial court has in actually commenting upon and thereby influencing to an extent,

the lay jury; it is respectfully requested that this petition be granted.

Respectfully submitted,

C. ANTHONY FRILOUX, JR.
*Counsel for Petitioner*
3011 San Jacinto, Suite 210
Houston 4, Texas

## Certificate of Service

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to William B. Butler, United States Attorney, 218 Post Office Building, Houston 2, Texas, and to Solicitor General, Department of Justice, Washington 25, D. C., postage prepaid, on this _____day of May, 1959.

C. ANTHONY FRILOUX, JR.

## APPENDIX A

Title 18, Section 3481

In trial of all persons charged with a commission of offenses against the United States in all proceedings , *that person charged, shall, at his own request*, be a competent witness. His failure to make such a request shall not create any presumption against, him.

## FIFTH AMENDMENT

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of the grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

## APPENDIX B

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17,356

LAWRENCE E. FOGARTY,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

*Appeal from the United States District Court for the Southern District of Texas*

(February 12, 1959.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges.

CAMERON, Circuit Judge: Appellant Fogarty and John Heaslet were indicted and convicted of conspiring to misapply the funds of a bank of which Fogarty was vice president, and on four substantive counts, charging specific misapplication of such funds. Heaslet was an automobile dealer, and Fogarty's bank handled a large

volume of his notes, liens and deferred payment contracts. The misapplication of funds and the false entries on the books of the bank related to the purchase by the bank of these written instruments and to the opening of special accounts in the bank for the alleged joint benefit of Fogarty and Heaslet.

Appellant does not challenge the sufficiency of the evidence; in fact, the salient facts are set forth in a stipulation of the parties and they establish appellant's guilt beyond question. Under these circumstances a further recitation of the facts is not required except as reference is made to them in discussing the errors assigned.

Appellant argues five points in his efforts to show that the court below committed reversible error in his trial.[1] Points I, III and IV deal with the court's charge concerning appellant's failure to testify,[2] and the argu-

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1 "I. Charge on the Law by Trial Court concerning Defendant-Appellants failure to testify in his own behalf was erroneous and constitutes substantive error."

"II. The Trial Court's comments and charge to the jury exceeded the permissive discretionary bounds and constituted fundamental error."

"III. The comment by Government Counsel during their argument to the jury constituted a comment on the failure to testify by the Defendant-Appellant and contravenes the Statutory Provisions of Title 18 U.S.C.A. 3481, and the spirit, if not the letter, of the Fifth Amend."

"IV. Denial of Defendant-Appellant's motion for a mistrial on the basis of Government Counsel's improper argument was error."

"V. Admission of testimony of Co-Defendant concerning an alleged ex-parte statement prepared by Counsel for hostile Co-Defendant, after exclusion of the document itself, was error."

2 "I instruct you further, that Mr. Fogarty, one of the defendants, has not seen fit to take the witness stand, and to testify in his own behalf. I instruct you that under the Fifth Amendment of the Constitution of this country, that he is

ment of government counsel, which he contends amounts to comment upon the fact that he did not testify.[3] Appellant neither objected to the quoted charge nor requested an instruction relating to his failure to testify as required by Rule 30, Fed. R. Crim. Proc. This portion of the charge was not mentioned when the court called upon counsel, in the absence of the jury, to state their objections to the charge. Certainly the charge as given does not constitute plain error which we will notice under Rule 52(b). *Isgate v. United States*, 5 Cir., 1949, 174 F. 2d 437; and *Ehrlich v. United States*, 5 Cir., 1956, 238 F. 2d 481. This is especially true where there was a complete failure to request a charge on the matter complained of. *Risinger v. United States*, 5 Cir., 1956, 236 F. 2d 96.[4]

We think that appellant's contention that the attorney for the Government adverted to his failure to testify while making his closing argument to the jury is without merit. One would have to strain hard to invest the

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within his rights in adopting that view. The fact that he did not testify is not evidence of his guilt and you will not let the fact that he saw fit not to testify, weigh in the slightest degree against him in your deliberations, nor will it be a subject of discussion or comment during your deliberations."

[3] "We have brought you what evidence we could find, or that the agents could find in this case. These documents came out of this bank; everyone of these documents was handled by Fogarty, or was handled by Heaslet, and sometimes together. We don't know what goes on inside their minds; we can't climb inside and see. We can't tell, even if we knew. The only thing we can do is draw an inference from these documents."

[4] The charge as given, moreover, embraces the substance of what, under the decisions and particularly under the case relied on by appellant, **Bruno v. United States**, 1939, 271 U.S. 287, the trial court should have charged.

language quoted *supra*, Fn. 3, with such a meaning. Here again no objection was made to the argument when made. It is not sufficient to move for a mistrial after all the arguments are in. The purpose of requiring objection to be made while the argument is in progress is to give counsel making the argument a chance to withdraw or explain it and the court a chance to exclude it from the jury's consideration. The Rules requiring prompt objection and the assignment of reasons therefor are rules of reason and their observance should not be lightly disregarded. Cf. *Paoli v. United States*, 1956, 352 U.S. 232; *United States v. Shuermann*, 8 Cir., 1949, 174 F. 2d 397, certiorari denied 338 U.S. 331; and *Corcoran v. United States*, 5 Cir., 1956, 229 F. 2d 295. We sit in judgment upon the actions of the trial court which were challenged by proper objections and cannot, except under the plain error doctrine of Rule 52(b), which certainly does not apply here, search for errors which were not presented to the trial court. Cf. *DeFonce v. City of Miami*, 5 Cir., 1958, 256 F. 2d 425, 428, and cases listed in Fn. 2 of that decision.

Where it is shown that injustice probably resulted to a person charged with crime, or where the evidence of guilt is not strong, we have not hesitated to condemn improper argument and to reverse convictions even where exception is not duly taken. *Steele v. United States*, 222 F. 2d 628; *Nalls v. United States*, 1956, 240 F. 2d 707; *Ginsberg v. United States*, 1958, 257 F. 2d 950; and *Handford v. United States*, 1957, 249 F. 2d 295; and cf. same case, 1958, 260 F. 2d 890. But we are not dealing with such a case here, where the guilt of appellant is perfectly plain. Moreover, a reading of the entire argument will demonstrate that the content was fair and unexcep-

tionable with respect to each of the points presented in appellant's argument.

At the conclusion of the court's charge appellant, when asked if there were any objections, excepted to the court's charge in quite general terms.[5] The objection wholly fails to state distinctly the matter to which appellant was objecting and the grounds of his objection, as required by Rule 30.[6] Appellant argues in the brief that certain comments by the court favorable to the co-defendant Heaslet had the necessary effect of pointing the finger of guilt at Fogarty. We set forth in the margin the various portions of the charge quoted in appellant's brief, to which we have added sufficient of the context to make the excerpts understandable.[7]

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5 "Now, as to the Court's comment on the evidence, on behalf of the Defendant Fogarty, we would like to move for a mistrial. It is this Defendant's position that after the instruction and comment of the Court on the evidence, that no jury in this Court could fairly and impartially consider the facts of this case as to the Defendant Fogarty without assuming from the Court's comment—and I think fairly—that the Defendant Fogarty is guilty beyond a shadow of a doubt, and therefore that their verdict should be a verdict of guilty as to the Defendant Fogarty. . . ."

6 ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

7 ". . . I will instruct you upon the law of the case, discuss and define your duties to you, and perhaps discuss the facts of the case with you to some extent.

"The indictment you may take with you to the jury room. . . . but the charge in this Court is oral, and while I have some notes before me from which I shall refresh my memory from time to time, you will not have your instructions in writing, so I will ask that you give me your close attention

The quoted portion of the charge is from separated paragraphs taken from a charge which was 22 pages long. The court covered the whole field of the accusations as they related to appellant and to Heaslet, jointly indicted and jointly tried, and both charged with conspiracy. Since appellant was an officer of the bank

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"Now, I have said that it is your duty to consider this evidence. That brings me to tell you what your function is here. You gentlemen who compose the jury serve as the fact-finding body of the Court. Wherever there is a conflict in the evidence. . . . some agency, some arm of the Court must weigh and consider all of that evidence and must determine where the truth lies. That is the function which the jury serves here. . . . The point I am making, *however*, is that you gentlemen are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given their testimony.

"In that connection, I should tell you, too, that in this Court the judge is permitted, if he sees fit to do so, to comment upon the evidence. By that I mean that I am permitted to tell you what I think about the evidence or about the facts or about the witnesses. I instruct you now, however, that if during the course of my charge I make a statement which you construe as indicating my own views upon the facts or upon the evidence, you are at perfect liberty to disregard what I say upon that score, for I have no intention to trespass upon the fact-finding body of the jury. If I make any statement of that sort, it is intended not to try to tell you or direct you what your findings should be, but it is intended to be of help or benefit in considering the facts. . . .

"I need not tell you, I am sure, that this case should have your most careful consideration. It is of the utmost importance to all concerned. You should weigh the evidence carefully in consideration of your findings and your verdict. Particularly is that true in the case of Mr. Heaslet. His testimony as a witness here was most interesting to me, as I am sure it was to you. While there were and perhaps still are many circumstances of a highly suspicious nature showing Mr. Heaslet's participation in the unlawful misapplication of funds, I was impressed by the fact that in his testimony he gave what appeared to me, at any event, to be a rather plausible explanation of many of those suspicious circumstances . . ."

and Heaslet had no connection with the bank, the ingredients of the crime charged in the substantive counts were quite different as related to the two. The court charged at length what it took to constitute a conspiracy and explained the relationship of the overt acts thereto. It read to the jury the statutes involved, and pointed out that Heaslet, not being a bank officer, could not, acting alone, be guilty of the substantive counts.

The court was called upon to bring into proper focus for the jury some of the phases of the case which had been developed in the evidence and referred to in the arguments. For instance, it pointed out that it was not necessary for conviction that the bank lose any money by the misapplication of the funds, or that Heaslet be guilty of any wrongdoing in his dealings with his customers. It charged also that Heaslet could be guilty of making false entries only if he and appellant had an agreement that such entries would be made. The isolated portions of the charge upon which appellant relies, therefore, have a less damaging appearance when put back into the context in which they were used.

In any event, if what the court said should be construed as being favorable to Heaslet, it could not be construed as being necessarily unfavorable to appellant. Since the conspiracy between them lay at the base of all of the charges, the court could not find appellant guilty and turn Heaslet loose (except, of course, as to the charges embraced in the substantive counts). The fact that the jury found both of them guilty indicates that the jury did not so construe the court's charge and that, if what the court said was error and if it had been properly objected to, it was harmless error.

This is not to say that we approve of the action of the trial court in commenting favorably upon Heaslet's testimony. Where, as here, one of the accused takes the witness stand and, in the effort to defend himself, tends to fasten guilt upon the other who does not testify, we think it the better practice for the trial judge to refrain from any statement or question from which the jury might infer that he credits one or discredits the other. We have steadfastly held in effect that "a judge must not only be impartial and disinterested, but must also appear so." *Blumberg v. United States*, 1955, 222 F. 2d 496, 501. And see *Gomila v. United States*, 1944, 146 F. 2d 372; *Hunter v. United States*, 1932, 62 F. 2d 217; *Adler v. United States*, 1910, 182 Fed. 464. And cf. *Quercia v. United States*, 289 U.S. 466, 472.

The final error argued by appellant is his claim that the court wrongfully permitted Heaslet to testify as to what Fogarty had stated to him concerning certain entries appellant had caused to be made upon the books of his bank. Appellant had given Heaslet a written statement to assist the latter in a civil litigation and the statement signed by Fogarty was offered in evidence. The court sustained appellant's objection to such an offer, but permitted Heaslet, over objection, to testify that appellant had made certain statements in his presence concerning pertinent entries upon the bank's books. We think the evidence was clearly admissible. It is always proper to prove by any competent witness a declaration against interest made by any party to litigation.

The principle was succinctly stated by the Ninth Circuit in the recent case of *Gonzalez v. Landon, District Director of Immigration Etc.*, 1954, 215 F. 2d 955, reversed

on other grounds 350 U.S. 920: "But these extrajudicial statements of plaintiff were not hearsay. These were substantive evidence. The extrajudicial statements of a party to the action, civil or criminal, are binding upon him and substantive evidence against him. There is an additional reason for the admission of these well-authenticated utterances of plaintiff, since they were statements against interest and thus have further guarantee of verity. They were clearly admissible for all purposes."[5]

We have given careful consideration to all of the points argued by appellant and find them without merit. Appellant was given a fair trial and was convicted on evidence pointing overwhelmingly to his guilt, and the judgment of the district court is

AFFIRMED.

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[5] To the same effect see IV Wigmore on Evidence, Third Edition, §1048; V Wigmore on Evidence, §1455, et seq.; 20 Am. Jur., Evidence, §§ 544 and 556; and Schoeps v. Carmichael, 9 Cir., 1949, 177 F.2d 391, 398, certiorari denied 339 U.S. 914.

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JUN 5 19
JAMES R. BROWNING

# In the Supreme Court of the United States

OCTOBER TERM, 1958

LAWRENCE E. FOGARTY, PETITIONER

*v.*

UNITED STATES OF AMERICA

***On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit***

## BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
*Solicitor General,*

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# In the Supreme Court of the United States

OCTOBER TERM, 1958

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No. 920

LAWRENCE E. FOGARTY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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***On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit***

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals (Pet. 12-20) is reported at 263 F. 2d 201.

### JURISDICTION

The judgment of the Court of Appeals was entered on February 12, 1959 (R. 290). A petition for rehearing was denied on April 3, 1959 (R. 295). On April 28, 1959, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to May 8, 1959, and subsequently the Chief Justice further extended the time to and including May 13,

1959. The petition for a writ of certiorari was filed on May 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the trial court's instruction on petitioner's right not to testify, to which defense counsel did not object, was prejudicial.

2. Whether the trial court's comments on the evidence were prejudicial.

## STATEMENT

Petitioner and John Heaslet were charged by indictment in the United States District Court for the Southern District of Texas with violating 18 U.S.C. 656 and 1005, by misapplication of bank funds and the making of false entries in the bank's records, and with conspiracy to commit those acts (R. 9-25, 28-44). Following a jury trial, petitioner and Heaslet were found guilty on all counts (R. 256-257) and sentenced by the court (R. 246, 250-251). On appeal, petitioner's conviction was affirmed (R. 281-289; Pet. 12-20).

1. The facts underlying the indictments have been stipulated by the petitioner and the United States Attorney (R. 270-278) and may be summarized as follows:

Petitioner was executive vice president of the North Side State Bank, which financed loans on automobiles sold by Mr. Heaslet. Petitioner and Heaslet opened numerous accounts at the bank, including an account called "John Heaslet Special Ac-

count." The more than 2500 documents introduced in evidence showed that as to numerous transactions a specified sum of money, ranging from $10.00 to $125 per transaction, was incorporated within the bank loan price and unknowingly assumed by the purchaser. This extra sum was deposited in the special account. During the course of the conspiracy more than $56,000 was placed in and withdrawn from the account.

Petitioner withdrew money from the special account and used it for his personal benefit. Heaslet testified that petitioner did so without his express consent, but he admitted on cross-examination that he had given petitioner a written statement authorizing withdrawals.

The line of credit extended to Heaslet amounted to $1,200,000, whereas the authorized maximum to a single dealer was $100,000. The usual credit information was not obtained prior to the loans. The bank suffered a loss of about $197,000 as a result of the arrangements between the defendants.

2. In opening argument, government counsel stated in part:

> We have brought you what evidence we could find, or that the agents could find in this case. These documents came out of this bank; everyone of these documents was handled by Fogarty, or was handled by Heaslet, and sometimes together. We don't know what goes on inside their minds; we can't climb inside and see. We can't tell, even if we knew. The only thing we can do is draw an inference from those documents. And the inference is pretty strong. This

> car sale from Heaslet was used by this man over here, Fogarty, vice president of that bank, to milk that bank of their money. * * * [R. 188-189.]
>
> * * * *
>
> We have brought you everything that we could find in this bank on this transaction here. And I ask you now, then, who is being fair? Every thing we have got. We didn't create these documents. They were created by these two defendants here. * * * [R. 191.]

At the close of the argument, petitioner said he had a motion for mistrial based on the argument but the judge stated he would hear it later (R. 192). After final argument, petitioner's counsel argued that the comments about the government putting everything before the jury necessarily left the inference that petitioner was concealing evidence by failing to testify (R. 210).

In his charge to the jury, the trial judge instructed:

> I instruct you further that Mr. Fogarty, one of the defendants here, has not seen fit to take the witness stand and to testify in his own behalf. I instruct you that under the Fifth Amendment of the Constitution of this country, he is within his rights in adopting that view. The fact that he did not testify is not evidence of his guilt; it does not create any inference or presumption of his guilt, and you will not let the fact that he saw fit not to testify weigh in the slightest degree against him in your deliberations, nor will it be a subject of discussion or comment during your deliberations. [R. 218.]

Petitioner's counsel neither objected to this instruction (R. 236-237) nor requested a charge on his failure to testify.

3. The trial judge, in reviewing the facts (R. 227-234), said:

> You should weigh the evidence carefully in consideration of your findings and your verdict. Particularly is that true in the case of Mr. Heaslet. His testimony as a witness here was most interesting to me, as I am sure it was to you. While there were and perhaps still are many circumstances of a highly suspicious nature showing Mr. Heaslet's participation in the unlawful misapplication of funds, if in fact there was a misapplication of bank funds, I was impressed by the fact that in his testimony he gave what appeared to me, at any event, to be a rather plausible explanation of many of those suspicious circumstances. Particularly is that true if you accept the premise which Mr. Heaslet asks you to accept, that is, that he had complete and implicit confidence in Mr. Fogarty. [R. 230-231.]

The Government, of course, points to the fact, in the first place, in undertaking to tie Heaslet in as closely as possible with the Heaslet Special Account and the use of the monies from that account for what apparently were personal purposes, the Government points out that the account was taken out in Mr. Heaslet's name. It points out that he signed the signature card in the first instance. The Government points out that the sale of each of these vehicles, when the papers were transmitted to the bank, carried along a slip—one of the stacks of exhibits

here—in Mr. Heaslet's handwriting, showing that a nominal sum, twenty or thirty dollars or so in each case, was to go to that Special Account. * * * The Government points to certain monies flowing to Mr. Heaslet out of that account. * * * [R. 231-232.]

* * * *

The largest item tending to show that Mr. Heaslet got some benefit from this allegedly improper bank account was the fact that the bank records would indicate that a great many of Mr. Heaslet's personal loans in the amount of a thousand or fifteen hundred dollars had been paid and charged against that John Heaslet Special Account. * * * Heaslet's suggestion is that what in fact happened is that Fogarty would fill in these notes for his own benefit take the thousand or fifteen hundred dollars and apparently use it for his own personal purposes, and then, when the time to repay the note bearing Heaslet's signature finally arrived, he would take the money from the Heaslet Special. [R. 233-234.]

Those are matters which you gentlemen must weigh and consider carefully. I am not, by what I have said suggesting that Mr. Heaslet is guilty or that he is innocent, but I am saying that this is a difficult case, calling for the most careful consideration by the jury of the guilt or innocence of both defendants. [R. 234.]

* * * *

Counsel for petitioner objected to the jury instructions on the ground, *inter alia*, that they assumed the guilt of petitioner (R. 236-237).

## ARGUMENT

1. Although admitting that no objection was taken to the trial judge's charge on the petitioner's failure to take the stand, petitioner argues that the reference to the Fifth Amendment in the instruction given by the court was "plain error" cognizable under Rule 52(b) of the Federal Rules of Criminal Procedure. The contention borders on the frivolous. The judge properly (see *Bruno* v. *United States*, 308 U.S. 287, 292) told the jury that petitioner's failure to testify was not evidence of guilt; that no inference or presumption of guilt could be drawn therefrom; and that the failure to testify could not be commented upon by the jury in their deliberations (R. 218). He also told them that this right stems from the Constitution, as it does, which merely served to emphasize the fact that no inference was to be drawn against petitioner from his failure to testify.

18 U.S.C. 3481 removed the common law disability of a defendant to testify for himself. The statutory provision that no inference shall be drawn from the failure to take the stand is merely the implementation of the right against self-incrimination guaranteed by the Fifth Amendment. It must be presumed that the jury followed the court's instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

As for the contention that a portion of the government's argument, set forth *supra*, amounted to a comment on the failure to testify, it would, as the court below said, require one "to strain hard to in-

vest the language • • • with such a meaning" (Pet. 14-15). Neither in itself, nor in relation to the court's charge, was there any improper comment on the failure to testify.

3. As to the judge's comments on the evidence, a point which petitioner raises but does not argue at length, the court below properly found that they were not prejudicial. The comments may be subject to criticism as being too favorable to the co-defendant, but, as the court below pointed out, any error in this respect would tend to redound to the benefit of petitioner, rather than to his prejudice, since lack of guilt by the co-defendant would make it impossible to convict petitioner on the conspiracy count. That the jury was not unduly influenced by these remarks is shown by the fact that they found the co-defendant guilty.

The trial judge admonished the jury that they were the fact-finding body (R. 215-216) and were at liberty to disregard any statement he might make concerning the facts or evidence adduced in the case (R. 217), and that he was not telling them what the facts of the case were (R. 221). He carefully defined the reasonable doubt standard (R. 214-215), the fact that the government bore the burden of proof in overcoming the presumption of innocence of the two defendants (R. 214), that the indictment was not evidence of guilt (R. 217), and that the failure of petitioner to testify was in no wise any indication of guilt (R. 218).

The court's remarks were thus within the permissible area of comment recognized by this Court.

*Starr* v. *United States*, 153 U.S. 614, 625; *Wibory* v. *United States*, 163 U.S. 632, 656; *United States* v. *Murdock*, 290 U.S. 389, 394; *Quercia* v. *United States*, 289 U.S. 466, 470.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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